No. 836

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Supreme Court of the United States

October Term, 1967

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
AID ASSOCIATION FOR LUTHERANS,
WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY,
Appellants,

v.

UNITED STATES OF AMERICA, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY OF BONDHOLDERS

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REPLY OF BONDHOLDERS

Both N&W and the ICC, in their motions to dismiss, assert that the Bondholders-Appellants seek merger of EL and N&W. This, of course, is erroneous. No Bondholders have presented such a plan at any stage of these proceedings.

On the contrary, the Commission has considered a plan involving control of EL by N&W and has approved that plan. But the Commission has not clearly reserved jurisdiction to protect Bondholder-Appellants if N&W attempts to obtain the fruits of merger at the Bondholders' expense. The Commission's brief, as did the court below, adverted to the power of courts of equity as adequate protection.*

* ICC Motion, p. 19n. 13.

That is irrelevant. Appellants are entitled to protection under §5(2) of the Interstate Commerce Act regardless of whether courts of equity are empowered to protect them.

It is our position that under §5(2) the Commission has a duty to provide that protection by reserving jurisdiction to grant relief to EL's bondholders should N&W abuse its power. This is essential in the situation presented here, where the Commission has approved absolute control of EL by N&W, with every incentive to N&W to use that control in its own interest and against the interest of EL's Bondholders. The opportunity to exercise that incentive is most obvious, since EL's main line from Buffalo to Chicago is paralleled by N&W track. If N&W were to appropriate for itself part of EL's traffic, this could enable N&W to avoid interest payments on EL's income bonds for the entire life of the bonds. In the Examiner's Report, Commissioner Webb recognized this type of problem and pointed out:

> "N&W, in its own interest, may manage new D&H Co. in such manner as to weaken its ability to fulfill its obligations" (Report, p. 140).

EL also moved to affirm despite the lack of legal interest of EL's management in either the grant or denial of the relief requested by Appellants. EL claims that the bondholders have never said what their vital interests were. As Appellants have pointed out in their Exceptions, their briefs below,* and their Jurisdictional Statement herein, this interest is in preventing the appropriation of their security and diversion of EL's earnings.

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* See especially pages 4-5, 12, 20-29 of Bondholder-Appellants' main brief below; pp. 2-3 of our Exceptions to the Commission.

EL also asserts that Appellants have not said how their rights will be infringed. This, too, is error, for Appellants have consistently pointed out that control will enable N&W to divert traffic and income from EL to N&W.*

Finally EL asserts that Appellants "have never stated . . . what, if anything, the Commission ought to do or ought to have done to protect them—except . . . to retain jurisdiction. . . ." Though Appellants have suggested additional relief, that statement of EL is correct to the extent that reservation of jurisdiction to afford future protection to Bondholders is precisely the protection sought. It is the minimum to which Appellants are entitled under §5(2). There is no ground, procedural or substantive, in any of the motions which would serve as a valid basis for refusing this relief.

Yet despite the fact that, within the time allowed by law, the Bondholders did, with ICC permission, intervene, become parties and file exceptions on this precise point, the Commission completely ignored their exceptions and failed even to make any findings thereon as undeniably required by law.** The court below never dealt with this point, but instead incorrectly asserted, without basis in record or in fact, that Appellants had not timely intervened. This was clear-cut error.

We submit that, as set out in our Jurisdictional Statement, the dangers to our rights are clear and the need for a reservation of ICC jurisdiction for our protection is also clear. Both the ICC and the court below simply failed to consider our rights. This failure was error.

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* *Ibid.*

** 5 U. S. C. §557(c).

We further submit that this error is so plain—indeed undenied by any party hereto—that in light of the need for expedition, no remand for reconsideration to the court below is necessary.

Conclusion

We submit that the Court should clarify, and if necessary remand to the ICC, so much of the final order in F.D. No. 21510 as deals with post-consummation relief, in order to make clear the ICC's continuing jurisdiction to give EL Bondholders relief, on application, should future developments prove that to be necessary and equitable.

November 30, 1967

Respectfully submitted,

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